BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JIMMY RAY HIATT, DECEASED Claimant	)	
VS.	)	
BOB BERGKAMP CONST. CO., INC. Respondent	)	Docket No. 1,020,845
AND	)	
ST. PAUL FIRE & MARINE INS. CO. Insurance Carrier	)	

ORDER

Respondent and its insurance carrier request review of the August 22, 2005 Award by Administrative Law Judge John D. Clark. The Board heard oral argument on December 20, 2005. After oral argument, the parties notified the Board that a tentative settlement agreement had been reached. The Board requested the parties to prepare an Agreed Order of Dismissal for the pending appeal. On January 30, 2006, the Board received a letter from claimant's attorney which indicated the proposed settlement agreement could not be finalized and such a resolution of the case was no longer possible. Consequently, the Board placed this case back in line for decision.

APPEARANCES

Brian D. Pistotnik of Wichita, Kansas, appeared for the claimant. Vincent A. Burnett of Wichita, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

This claim is for death benefits brought by the surviving spouse and dependent child of Jimmy Ray Hiatt. Mr. Hiatt died on August 3, 2004 as a result of injuries suffered when he was thrown from his vehicle as it rolled when it went off the roadway.

The Administrative Law Judge (ALJ) found the claimant's accidental death arose out of and in the course of employment. The ALJ concluded the "going and coming" rule did not apply to the decedent because travel was an integral part of his job. The ALJ awarded claimant's surviving spouse and dependent child death benefits as well as funeral expenses to be paid by the respondent.

The respondent requests review of whether the decedent's accidental death arose out of and in the course of employment. Respondent argues that travel was not an integral part of decedent's employment and the decedent had left work for the day when the accident occurred. Because decedent had left the duties of his employment respondent further argues the "going and coming" rule precludes a finding the decedent's accidental death arose out of and in the course of employment. The respondent requests the Board to reverse the ALJ's Award and deny workers compensation benefits.

Conversely, claimant argues that travel was an integral part of his employment as demonstrated by the fact that he received travel pay. Claimant argues the ALJ's Award should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The ALJ's Award sets out findings of fact and conclusions of law that are detailed, accurate and supported by the record. It is not necessary to repeat those findings and conclusions herein. The Board adopts the ALJ's findings and conclusions as its own and affirms.

The decedent, a heavy equipment operator for respondent, was involved in a single vehicle accident on August 3, 2004, which resulted in his death. The claimant's vehicle's right wheels went off the roadway, he overcorrected and was thrown from the vehicle as it rolled.[1] The claimant had left the road and bridge construction work site for the day and the accident occurred as he was on his way home.

The respondent denied the claim for death benefits. Because the accident occurred after claimant had left work for the day, the respondent argued the "going and coming" rule, K.S.A. 44-508(f), specifically precludes a finding that the accident arose out of and in the course of employment.

K.S.A. 2004 Supp. 44-508(f) provides in pertinent part:

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[1] Stipulation filed June 28, 2005.

> The words 'arising out of and in the course of employment' as used in the workers compensation act shall not be construed to include injuries to the employee occurring while the employee is on the way to assume the duties of employment or after leaving such duties, the proximate cause of which injury is not the employer's negligence. An employee shall not be construed as being on the way to assume the duties of employment or having left such duties at a time when the worker is on the premises of the employer or on the only available route to or from work which is a route involving a special risk or hazard and which is a route not used by the public except in dealings with the employer. An employee shall not be construed as being on the way to assume the duties of employment, if the employee is a provider of emergency services responding to an emergency.

This is a legislative declaration that there is no causal relationship between an accidental injury and a worker's employment while the worker is on the way to assume the worker's duties or after leaving those duties, which are not proximately caused by the employer's negligence.[2] In *Thompson*, the Court, while analyzing what risks were causally related to a worker's employment, wrote:

> The rationale for the "going and coming" rule is that while on the way to or from work the employee is subjected only to the same risks or hazards as those to which the general public is subjected. Thus, those risks are not causally related to the employment.[3]

The "going and coming" rule does not apply if the worker is injured on the employer's premises.[4] Nor is it applicable when the worker is injured while using the only route available to or from work involving a special risk or hazard and the route is not used by the public, except dealing with the employer.[5]

The Kansas Appellate Courts have also provided exceptions to the "going and coming" rule, for example, a worker's injuries are compensable when the worker is injured while operating a motor vehicle on a public roadway and the operation of the vehicle is an integral part or is necessary to the employment.[6]

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[2] *Chapman v. Victory Sand & Stone Co.*, 197 Kan. 377, 416 P.2d 754 (1966).

[3] *Thompson* v. *Law Office of Alan Joseph*, 256 Kan. 36, 46, 883 P.2d 768 (1994).

[4] *Id.* at Syl. ¶ 1. Where the court held that the term "premises" is narrowly construed to be an area, controlled by the employer.

[5] *Chapman v. Beech Aircraft Corp.*, 258 Kan. 653, 907 P.2d 828 (1995).

[6] *Messenger v. Sage Drilling Co.*, 9 Kan. App. 2d 435, 680 P.2d 556 *rev. denied* 235 Kan. 1042 (1984).

The ALJ determined that travel to the various road construction work sites was an integral and necessary part of the claimant's employment. An analysis of the facts supports this conclusion.

The decedent was required to travel in his own vehicle to job sites for five separate projects in Elk County where he was involved in the heavy excavation and grading preparatory for road and bridge construction. Mr. Terry Brown, decedent's foreman, testified that decedent was required to travel to the separate work sites and each work site would vary. As a phase of work at one site was completed decedent would then move to the next job site or return to complete the next phase at a previous job site.

In addition to his regular pay, decedent was paid a daily amount respondent called "per diem" but this payment was identified on claimant's paycheck as "Non-Taxable Travel Expense." This money was provided to respondent's employees who had to travel to construction job sites more than 30 miles from the employee's home. It was based upon a graduated scale and provided if the mileage from the employee's home to the job site was from 31 to 50 miles, payment was $20 per day; from 51 to 70 miles, payment was $30 per day; and from 71 to 150 miles, payment was $40 per day.[7]

Respondent's employees who were provided vehicles did not receive this daily payment. In addition, respondent's employees who drove to the respondent's shop in Wichita did not receive these payments irrespective of the distance from their home to Wichita.

In *Messenger*, the Court noted in Syllabus 4:

> In a workers' compensation case, the record is examined, and it is *held*, that where (1) employees are required to travel and to provide their own transportation, (2) the employees are compensated for this travel, and (3) both the employer and employees are benefited by this arrangement, then such travel is a necessary incident to the employment, and there is a causal relationship between such employment and an accident occurring during such travels; thus, the "going and coming" rule, K.S.A. 1983 Supp. 44-508(f), does not apply, and the trial court correctly awarded compensation.[8]

In *Messenger*, the claimant was killed in a truck accident while on the way home from a distant drilling site. A key factor in *Messenger* was that the employer actively sought persons who were willing to work at "mobile sites". As the respondent was in the practice of paying drillers to drive to far away points, providing an entire crew with transportation

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[7] Bergkamp Depo., Ex. 4.

[8] *Messenger v. Sage Drilling Co.*, 9 Kan. App. 2d 435.

was customary.[9] Additionally, testimony in *Messenger* indicated that the company received a definite benefit when hiring crew members who agreed to travel, as the drilling company did not attempt to hire team members who lived near each drilling site, but instead expected the existing crews to travel to the drilling sites. In *Messenger*, the employees were found to have no permanent work site, but were required to travel to distant locations. As that was the common and accepted practice in the oil field business where Messenger was employed, the claimant's death was found to arise out of and in the course of his employment.

Mr. Brown, respondent's foreman on the Elk County projects, testified respondent sought prospective employees who were willing to work at temporary mobile job sites and because it was not always possible to hire local workers at the job sites it was a benefit for respondent to hire employees willing to travel to the different job sites. Mr. Brown further confirmed that travel to the construction sites was an incident of employment as demonstrated by the fact that the job site locations typically varied from month to month.

The decedent was required to provide his own vehicle to travel to the various road construction job sites and was paid additional compensation for the travel. The respondent agreed it benefited by this arrangement. And although claimant might work at a specific job site for up to a month, the job sites were not permanent locations and the time varied at the different locations. The Board agrees with the ALJ's analysis that this case is analogous to *Messenger*.

The respondent argues *Butera*[10] is controlling. In *Butera*, the Kansas Court of Appeals held that driving to and from a regular job site is not considered an integral part of the job for a worker who has temporarily relocated and established long-term lodging convenient to a remote job site distant from his home. This case is distinguishable because here claimant would drive to various job sites and was paid for such travel on a daily basis. Whereas, in *Butera,* the claimant was not paid for travel after he found lodging near the remote job site. Moreover, it was noted that if Butera had been injured on a trip to the work site to set up a residence and for which he was paid a mileage rate such trips would be specially treated and likely compensable. Because decedent was paid for his daily trip to work, such trips were specially treated.

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[9] *Id.* at 439.

[10] *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

The Board further notes that the fact claimant commuted to and from his home each day is not controlling upon a determination that travel was an integral part of his employment.[11]

The Board affirms the ALJ's determination that travel was an integral part of decedent's employment. Therefore, the "going and coming" rule does not apply and the ALJ's award of compensation is affirmed.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge John D. Clark dated August 22, 2005, is affirmed.

IT IS SO ORDERED.

Dated this 28th day of February 2006.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Brian D. Pistotnik, Attorney for Claimant
Vincent A. Burnett, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

[11] See, *Sumner v. Meier's Ready Mix, Inc.*, ___ Kan. ___ 126 P.3d 1127 (2006); *Foos v. Terminix*, 277 Kan. 687, 89 P.3d 546 (2004); *Kindel v. Ferco Rental Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).